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No. 787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CORDELL HULL McPEAK,

PETITIONER,

VS.

STATE OF NORTH CAROLINA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of North Carolina in the case of STATE v. CORDELL HULL McPEAK is reported at 243 N. C., 243, which is the official report of the North Carolina Supreme Court. The opinion is fully and correctly set out in the appendix of the petitioner's petition.

QUESTIONS PRESENTED

I. DOES THE CONVICTION OF THE PETITIONER IN THE NORTH CAROLINA STATE COURTS, EVEN IF BASED ON EVIDENCE OBTAINED PURSUANT TO AN UNLAWFUL SEARCH, VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. DOES THE CONVICTION OF THE PETITIONER IN THE NORTH CAROLINA STATE COURTS, WHEN BASED ON EVIDENCE FOUND BY THE NORTH CAROLINA STATE COURT TO HAVE BEEN OBTAINED PURSUANT TO A LAWFUL SEARCH, PRESENT ANY FEDERAL QUESTION?

STATEMENT OF THE CASE

The petitioner, Cordell Hull McPeak, seeks, by writ of certiorari, to have the United States Supreme Court review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Surry County, North Carolina, imposing sentence upon the petitioner based upon his conviction of unlawful and felonious possession and transportation of implements for housebreaking and a quantity of narcotic drugs. At the trial of the defendant in the Superior Court of Surry County, North Carolina, the State's evidence showed that State Highway Patrolman J. B. Howell signaled a motor vehicle to stop on a public road near Mount Airy, North Carolina. The motor vehicle was being operated by the defendant McPeak, and one Campbell was a passenger in the rear seat. The patrolman examined the driving license and registration card and walked to the rear of the car to check the license number. The defendant McPeak said that "It was his car." Patrolman Howell's testimony is, in part, as follows (R p 9):

> "I TOLD HIM I WOULD LIKE TO SEARCH HIS CAR, AND I TOLD HIM HE DIDN'T HAVE TO LET US SEARCH HIS CAR IF HE DIDN'T WANT TO. He said, 'Well, there's nothing on the car.' He walked back to the car and took the switch key out and walked to the rear and unlocked the trunk. He unzipped a leather case he had in there. McPeak raised the lid. McPeak unzipped the bag and fumbled through some articles of clothing in the bag and said, 'See, I don't have anything.' I noticed at that time a sledge hammer lying in the trunk of the car. It was about a five- or six-pound hammer. It was wrapped in paper with a string around it." (Emphasis added.)

The officer continued the search of the car and discovered 597 Dolophine tablets, 1749 Codeine Sulphate tablets, 140 Mercodine tablets, 134 Hysoscine, Morphine and Cactus tablets, and five Delaudid Suppositories, all of which are narcotic drugs and all of which are either codeine or morphine or a derivative of morphine. (R pp 28-30, 35). The patrolman also found a sledge hammer (R p 9), a steel bar (R p 10), dynamite caps with fuses (R p 15), soap (R p 15), socket wrench

extension (R p 16), wire with clamps (R p 17), a screw driver (R p 23), and a bottle of nitroglycerine (R pp 14, 36). The officer also discovered a file which fell forward out of the defendant McPeak's pocket. (R pp 9, 20).

Upon a motion to suppress the foregoing evidence at said trial, the record discloses as follows:

> "THE COURT FINDS AS A FACT THAT McPEAK GAVE PERMISSION TO THE OFFICERS TO SEARCH THE CAR. THE COURT FURTHER FINDS AS A FACT THAT IT WAS A LEGAL SEARCH AND THAT THE EVIDENCE FOUND THERE IN THE CAR WAS COMPETENT AND OVERRULES THE MOTION BY DEFENDANTS TO SUPPRESS THE TESTIMONY." (R p 10).

The defendant did not offer any evidence as to this point or any other point. From conviction and judgment thereon, the defendant appealed to the Supreme Court of North Carolina which held there had been no error in the trial.

ARGUMENT

I.

> THE ADMISSION IN A STATE COURT OF EVIDENCE OBTAINED PURSUANT TO AN UNLAWFUL SEARCH OF A PLACE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In WOLF v. COLORADO, 338 U.S., 25, at page 33, Mr. Justice Frankfurter, writing the majority opinion for the Court, states:

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Quite clearly, therefore, no substantial Federal question is raised and such question as may heretofore have existed with respect to this point has been resolved against the de-

fendant by the Supreme Court of the United States.

BANKS v. STATE, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359, writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96;

IRVINE v. CALIFORNIA, 347 US 128, 98 L. ed. 561, 74 S. Ct. 381;

STEFANELLI v. MINARD, 342 U S 117, 96 L. ed. 138, 72 S. Ct. 118.

II.

NO FEDERAL QUESTION IS PRESENTED BECAUSE THE NORTH CAROLINA COURT FOUND AS A FACT THAT THE EVIDENCE IN QUESTION WAS OBTAINED PURSUANT TO A LAWFUL SEARCH.

Even though evidence obtained pursuant to an unlawful search would properly be admissible in a State court, as set out above, the evidence in the instant case was obtained pursuant to a lawful search, and was specifically found by the State Court to have been obtained pursuant to a lawful search. The record discloses as follows on page 10:

"THE COURT FINDS AS A FACT THAT McPEAK GAVE PERMISSION TO THE OFFICERS TO SEARCH THE CAR. THE COURT FURTHER FINDS AS A FACT THAT IT WAS A LEGAL SEARCH AND THAT THE EVIDENCE FOUND THERE IN THE CAR WAS COMPETENT AND OVERRULES THE MOTION BY DEFENDANTS TO SUPPRESS THE TESTIMONY." (R p 10).

The North Carolina State courts held that the search was lawful because the petitioner consented to the search, and there was abundant evidence to support such finding. No evidence was offered by the defendant as to this point or any other point.

A voluntary consent to search constitutes a waiver of the right to be free from unreasonable searches and seizures, and a person who has consented to a search may not raise the objection that his constitutional or statutory rights were violated.

ZAP v. U. S., 328 U. S. 624, 90 L. Ed. 1477

PEOPLE v. PRESTON, 341 Ill. 407, 173 N. E. 383

47 AM. JUR., Searches and Seizures, Sec. 71

79 C.J.S., Searches and Seizures, Sec. 62.

CONCLUSION

The questions presented in the petition are not Federal questions, or, if they are, they are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. The evidence complained of was found by the North Carolina State courts to have been obtained pursuant to a lawful search. Even if the evidence complained of in the petition was obtained pursuant to an unlawful search, it nevertheless was admissable in evidence in a State court, and, under any view of the case, the matter was correctly decided in the North Carolina State courts. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

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